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Supreme Court, U.S.
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No. 00-1235

IN THE

Supreme Court of the United States

RUDOLPH GIULIANI,
Mayor of the City of New York, *et al.*,

Petitioners,

v.

HAROLD YOURMAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should *certiorari* be granted where the Court of Appeals remanded the case to the district court "for further proceedings not inconsistent" with its opinion and those proceedings could result in a victory for the petitioners?

2. Should *certiorari* be granted to decide whether the application of the salary basis test to local government employees violates the Tenth Amendment where that issue was not argued to or decided by the Court of Appeals?

3. Should *certiorari* be granted to determine the application of the window of correction where there is no real conflict in the decisions of the courts of appeals and the petitioners urge an interpretation that is contrary to that of the Secretary of Labor?

STATEMENT OF THE CASE

The facts relevant to this petition are stated in the opinion of the Court of Appeals, *Yourman v. Giuliani*, 229 F.3d 124, 126-127 (2d Cir. 2000). Because the petitioners make a number of misstatements of fact and law, respondents, pursuant to Rule 15.1, takes this opportunity to address those misstatements.

Many of the issues raised by petitioners in their statement of the case were decided by this Court in *Auer v. Robbins*, 519 U.S. 452 (1997). Thus, *Auer* held that the salary basis test as interpreted by the Department of Labor was reasonable including the "Secretary's view that public employers are not so differently situated with regard to disciplining their employees as to require wholesale revision of [this] time-tested rule . . ." 519 U.S. at 458. Similarly, in *Auer*, this Court rejected the argument that the Department of Labor should have conducted rule-making on the disciplinary part of the salary basis test. 519 U.S. at 458-59.

Moreover, the petitioners would have this Court believe that local governments throughout the country are facing the possibility of massive overtime liability. There is nothing in the record to substantiate this statement. Like petitioners, who changed their rules in 1993, most local government have long since changed their disciplinary rules, or have had ample time to make such changes, to limit their liability.

Finally, the horrors referred to by petitioners (page 14 of the petition) have simply not taken place. The managers did not become hourly employees so there has been no overtime costs for managers since 1993. Nor is there anything in the record to support the petitioners' claims about

the difficulty of administering the new disciplinary rules. Like private employers, and all the other public employers that have learned to live with the Fair Labor Standards Act, petitioners can still take a variety of disciplinary actions against those managers who engage in misconduct, such as a reprimand, suspensions in weekly increments or demotions.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO FINAL JUDGMENT BELOW; THE PETITION IS PREMATURE

The Court of Appeals remanded this case to the district court "for proceedings not inconsistent" with the opinion. 229 F.3d at 133. Those proceedings will require consideration of various factors listed by the Court in making the factual determination as to whether the petitioners engaged in an actual practice of making impermissible disciplinary deductions. If the district court determines that there is no actual practice, petitioners win. On the other hand, if the district court determines that there is an actual practice, it will determine whether or not the window of correction is available.[1]

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1. Given the statement of the Court of Appeals that the window of correction is not available where there is an actual practice (*Yourman*, 229 F.3d at 129, citing *Klem v. County of Santa Clara*, 208 F.3d 1085 (9th Cir. 2000) and the Secretary of Labor's interpretation), the district court presumably would find that the window of correction is not available. That would be the proper time for the City to seek a Writ of Certiorari, if it could show a conflict in the circuit courts. (*See* Point III, below).

Ordinarily, this Court will not grant Certiorari where there has been a remand and no final judgment of the lower court. *Virginia Military Institute v. United States*, 508 U.S. 946 (1993); *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967). *See generally* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* § 4.18, pp. 195-198 (7th Ed. 1993).

II.

THE QUESTION OF VIOLATION OF THE TENTH AMENDMENT IS NOT PROPERLY BEFORE THIS COURT

The petitioners ask this Court to determine whether the application of the salary basis test to local government employees violates the Tenth Amendment. That issue was not raised to or decided by the Court of Appeals in its opinion.[2]

In its brief to the Court of Appeals, the petitioners stated, in their jurisdictional statement, that "it is the defendants position that plaintiffs' claims are precluded by the Tenth Amendment . . . and defendants have preserved that claim, to raise if necessary in the appropriate forum." (Appellees' brief to the Court of Appeals, p. 2). Nothing further was argued concerning the Tenth Amendment and the Court of Appeals did not address the issue.

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2. The issue was argued and decided in an earlier appeal in this matter. 84 F.3d 655 (2d Cir. 1996) and presented to this Court in petitioners' previous petition for a writ of *certiorari*, 519 U.S. 1145 (1997). This Court did not decide the Tenth Amendment issue but vacated the judgment and remanded it to the lower court in the light of *Auer*.

It is submitted that a party does not "preserve" an issue simply by stating that the issue is preserved. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. Kress*, 398 U.S. 144, 147 n.2 (1970); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981). *See also Auer*, 519 U.S. at 464; Stern, et al., *op. cit.*, p. 344.

III.

THERE IS NO REAL CONFLICT IN THE DECISIONS OF THE CIRCUIT COURTS

Petitioners argue that *Auer* left undecided whether the window of correction was available to an employer who was found to have an actual practice of docking pay and that there have been conflicting determinations on this issue by the circuit courts.

While the *Auer* court did not need to decide this issue, it said enough to indicate that the window may not be available where there is an actual practice of impermissible deductions. 519 U.S. at 463. No circuit court, post-*Auer*, upon finding an actual practice of making impermissible deductions, has ruled otherwise. Furthermore, the Secretary of Labor has stated in *amicus* briefs filed in the Second (*Yourman*), Sixth (*Tackacs v. Hahn Automotive Corp.*, No. 99-4431), Seventh (*Whetsel v. Network Property Services, LLC*, No. 00-2798) and Ninth (*Klem*) Circuits, that the window of correction is not open where there is an actual practice of making improper disciplinary deductions.

In *Auer*, this Court noted that the "salary basis test is a creature of the Secretary's own regulations" and the Secretary's interpretation is controlling unless "plainly erroneous or inconsistent with the regulation." *Auer*, at 461.

The window of correction is contained in the Secretary's regulations at 29 C.F.R. § 541.118(a)(6) (2000). It is interpreted by the Secretary as not being available if an employer engages in a practice of making impermissible deductions. *Yourman*, 229 F.3d at 130; *Klem*, 208 F.3d at 1091. Conversely, when there is no actual practice, like in *Auer*, the window of correction remains open.[3]

None of the post-*Auer* circuit court cases to which petitioners refer involved a pattern or practice of improper deductions. To the extent that those cases address the question of whether the window of correction is available to cure an employer's actual practice of improper disciplinary suspensions, they do so in *dicta*. Significantly, the Secretary of Labor did not file briefs in those cases; nor do those circuit courts address the Secretary of Labor's interpretation of her own window of correction rule.

CONCLUSION

For the above reasons, the Petition should be denied.

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3. To interpret the rule otherwise would allow an employer to treat its employees as exempt for overtime purposes while, at the same time, intentionally failing to comply with the "salary basis" rule. In the event that its employees sued for overtime pay, such an employer simply could use the window of correction to comply retroactively with the salary basis requirements. According to the Secretary, such a result would render the "salary basis" rule "essentially meaningless" and run counter to the rule that FLSA exemptions are to be construed narrowly.

Klem, 208 F.3d at 1092; *Yourman*, 229 F.3d at 130.

Respectfully submitted,

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